68. We are particularly interested in the potential for new entrants to build new last miles to homes and small businesses. What deregulatory and pro-competitive incentives will lead to the deployment of more last miles of advanced telecommunications capability? Is serving inner cities a rational business decision for CMRS and wireless cable companies? Are there regulatory barriers to the wide use of prepaid service plans that might speed deployment of advanced services to low income Americans -- the advanced services equivalent to prepaid calling cards and prepaid wireless services?

C. Removing Barriers to Infrastructure Investment and Promoting Competition

69. Section 706(a) requires that, in order to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability, the Commission use price-cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. We ask for comment about how in particular we might apply each of these techniques to aid the deployment of advanced telecommunications capability. In the case of forbearance, from what statutory provisions or rules should the Commission forbear, and how would such forbearance satisfy the necessary statutory criteria?[73]

70. Other Methods. We invite suggestions for other changes in our rules, and in statutes, that would use regulatory forbearance, would remove barriers to infrastructure investment, or would promote competition so as to speed the deployment of advanced telecommunications capability. Do our regulations discourage investment, especially in one particular technology or by one particular class of companies?[74] If a commenter believes that a law or regulation should be repealed, we ask that it explain how such a repeal might stimulate the deployment of advanced telecommunications capability.

71. Many actions by the Commission might speed the deployment of advanced telecommunications capability. The Alliance for Public Technology, for example, has suggested that, if it appears likely that there will be a long-lasting shortage of advanced telecommunications capability in some areas, such as inner cities or low-income rural areas, the Commission should use social contracts with incumbent LECs similar to those with cable operators, place conditions on mergers and acquisitions, and encourage community-based

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[73] See 47 U.S.C. § 160.

[74] The Economic Strategy Institute, for example, has directed attention particularly to our rules about depreciation accounting, cost allocation, interconnection, and separate subsidiaries. Letter from Lawrence Chimerinbe, Senior Vice President and Chief Economist, Eric Olbeter, Director, Advanced Telecom & Information Technology Program, and Larry C. Darby, Visiting Fellow, Economic Strategy Institute, to William E. Kennard, Chairman, FCC, July 30, 1998, at 4, available at http://www.econstrat.org/esi706.htm.

organizations to create a "demand pull."[75] APT calls for a federal/state/community-based "partnering" to help rural and low-income areas fill the void that competitive entities will leave because they need to go where demand and willingness to pay are highest. APT suggests such a partnership is a necessary complement to a market-based system, because the market for advanced telecommunications capability will likely not be a perfect one.[76] We ask for comment on APT's proposals. Is the great shortage envisioned by APT likely to occur? Is APT's partnering an efficient and effective way to fill it and encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans by utilizing price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment? What are the advantages and/or disadvantages of measures like those proposed by APT? Would these measures be consistent with section 706 and the overall framework of the Act?

72. APT also urges "pricing reform" as another way to remove barriers to the deployment of advanced telecommunications capability. It states:

> New entrants naturally respond to the economic signals. Today those signals, stemming from price regulation that sets residential prices far below business prices without sufficient cost justification, have been a factor contributing to market forces which are skewing competitive entry and investment very largely toward the business market. Where states like New York have instituted reforms to close this gap and bring residential rates more in line with costs, competitors have responded by beginning to offer local service to residential subscribers.[77]

We ask for comment on this analysis, and on the broader issue of the relationship between section 706, which focuses on the deployment of advanced telecommunications capability, and the provisions of the 1996 Act that concern universal service, especially section 254.[78] We

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[75] Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry & Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, *Petition of the Alliance for Public Technology* at 27-41 (Feb. 18, 1998) (APT Petition).

[76] *Id.* at 35-38.

[77] *Id.* at 25-26 (footnote omitted).

[78] In implementing the universal service provisions of the Act, the Commission noted that "section 706 reinforces the goals of section 254." Federal-State Joint Board on Universal Service, *Report & Order*, 12 FCC Rcd 8776, 9091-92 (1997) (Universal Service Order). *Compare* Section 706 *with* 47 U.S.C. § 254(b)(2) ("Access to advanced telecommunications and information services should be provided in all regions of the Nation."), (3) ("Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services

are interested in knowing the degree, if any, to which the goals of section 706 might be fulfilled by the Commission's actions under section 254. To what extent do universal service support mechanisms help ensure access to advanced services -- if not generally, then with regard to schools, classrooms, libraries and rural areas in particular? In its rules implementing section 254(h) of the Act, the Commission has established a mechanism to support the provision of telecommunications services, Internet access, and internal connections to eligible schools and libraries. The Commission did not, however, specifically address the question of whether such services constitute advanced telecommunications capability, and left it to the schools and libraries themselves to determine which telecommunications services would best meet their needs and budgets.[79] Therefore, we are interested in knowing whether the Commission's current rules implementing section 254(h)(1), as well as other sources of funding, are resulting in the deployment of advanced telecommunications capability to schools, libraries and rural health care providers.

73. More broadly, is there a point at which a form of advanced telecommunications capability, or an advanced service, should qualify for inclusion in universal service? What is the right balance between the accomplishment of Congress' goals for universal service and section 706's reliance on companies' private profit motivations to invest in and deploy advanced telecommunications capabilities?[80] Should the goals of section 706 be considered in interpreting the word "evolving" in section 254's definition of universal service?[81]

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provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas"), 6 ("Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h)."), (h)(2) ("The Commission shall establish competitively neutral rules-- (A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and (B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.").

[79] In the Universal Service Order, the Commission established that it was not conditioning the receipt of universal service support on an entity choosing a particular bandwidth or technology. *See, e.g.*, Universal Service Order, 12 FCC Rcd at 9019-20 (stating that "a situation in which certain technologies were favored over others would violate the overall principle of competitive neutrality adopted for purposes of section 254"). *See also id.* at 9006-07 (stating that, pursuant to section 254(h)(1)(B), schools and libraries can choose whichever telecommunications technologies best meet their telecommunications needs). *See also id.* at 8801-03 (discussing the principle of competitive neutrality).

[80] NTIA Letter, *supra* note 72, at 3.

[81] 47 U.S.C. § 254(c)(1) ("Universal service is an *evolving* level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.") (italics added). On or before January 1, 2001, the Commission will convene a Federal-State Joint Board to review the current definition of universal service. Universal Service Order, *supra* note 78, 12 FCC Rcd at 8790, 8807, 8834-35.

74. Wireless deployment of advanced telecommunications capability might be significantly advanced by auctioning more spectrum, by the widest possible definition of the services that can be provided on spectrum, by speedier methods to make encumbered spectrum free for new uses, by increased spectrum sharing and overlay use on spectrum, and by added incentives for CMRS and high-bandwidth licensees to deploy advanced telecommunications capability. Can and should the Commission use its authority pursuant to sections 256 and 259 of the Act (concerning, respectively, coordination for interconnectivity and infrastructure sharing) to make the deployment of advanced telecommunications capability more uniform?[82] Have other countries removed economic or regulatory barriers to advanced telecommunications capability in ways that can be fruitfully applied in the U.S.?

75. We also note that some of the potential suppliers of advanced telecommunications capability use asymmetric architecture.[83] This usually entails high speeds downstream (from the advanced service provider to the end user) and slow speeds upstream. We ask whether advanced telecommunications capability or any type of advanced service is best provided via asymmetric architecture. Is there any Commission rule or policy that favors symmetric architecture in cases where it might be cheaper, more efficient, or otherwise beneficial to consumers to use asymmetric architecture, or vice versa? Will asymmetric architecture be deployed most easily through partnering among companies in different industry segments rather than within companies? How could our rules or policies be amended to leave the choice of architecture to market forces?

76. We also welcome comment, transcending the segment-by-segment pattern of Section A.2 above, on the deployment of advanced telecommunications capability. On the whole, how much deployment of advanced telecommunications capability is occurring in the U.S., and is it occurring in a reasonable and timely fashion? Overall, what is the composition of such activity, and what trends in it are discernible? What are the determinants of investment in advanced telecommunications capability?

77. We also request comment about the basic legal and regulatory model that will best foster the deployment of advanced telecommunications capability. At present, we use several different models for different industries. These include a "telephone model" (common carriage of bundled and unbundled packages), a "cable tv model" (multiple channels bundled with content, free of common carrier obligations), a "broadcast model" (single channels bundled with content, with specific content-based public interest obligations), a "resale/UNE" model to promote competition in local exchange voice telecommunications, and a "facilities-based" model to promote competition in the MVPD market. Congress, when it enacted the Act, created or retained these models and thereby endorsed their continued use. It may be, however, that as discrete industries and services begin to converge, the application of

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[82] 47 U.S.C. §§ 256, 259.

[83] *See, e.g., supra* n.44.

different regulatory models to competing services will have effects on the marketplace. We ask for comment on such effects. Will they improve or distort market performance? At what point will the use of different regulatory models impair market performance more than they improve it?

78. More broadly, we ask for comment on whether any of the models described in the preceding paragraph is likely to lead to speedier deployment of advanced telecommunications capability. If one model is, how might we apply it more broadly than we do now, from the point of view of both legal authority and regulatory practice? Would some other regulatory model, different from the ones noted above, lead to speedier deployment? Conversely, what negative consequences, if any, will measures adopted to accelerate deployment have in the long term? What can the Commission do to avoid those negative consequences? We welcome suggestions, both about models and about how to apply them to all entrants into advanced telecommunications capability.

79. Also, most ISPs depend, for access to their retail customers, on the last mile facilities of others, especially LECs. There are thousands of ISPs, but only a few providers of last miles that have achieved mass acceptance -- in most places, the incumbent LEC and the cable television provider. Many of the latter have, or will have, their own internal ISP operations. Assuming that there will always be far more ISPs than there will be providers of last miles in an area, we ask for comment on whether interactions between ISPs and providers of last miles will require regulatory intervention.[84] For example, is access by retail customers to thousands of ISPs in the public interest? Is an unregulated market likely to give the holders of last miles the ability and incentive to discriminate against all ISPs or in favor of their own ISP operations, to the detriment of consumers? If such conduct is likely, what is the appropriate regulatory remedy, if any?[85] What can and should the Commission do to preserve efficient peering arrangements among Internet companies, especially in the face of consolidations of large proprietary gateways? We ask for comment whether the Commission should monitor or have authority over peering arrangements to assure that the public interest is served.

80. Looking into the future, we ask what, if any, system of regulation might best fit the market for advanced telecommunications capability. Enacting such a system might require major amendments to the Act. For example, it is reasonable to question a policy of regulating several competitors in a market differently -- wireline common carriers under Title II, conventional television broadcasters under Title III, wireless common carriers under Titles

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[84] We ask the same question about interexchange carriers, although at present there are more of them available in an area than there are providers of last miles.

[85] In the Further Notice of Proposed Rulemaking in the Computer III Remand, we are considering whether to grant ISPs the same rights as competitive LECs to UNEs vis-a-vis incumbent LECs and RBOCs. *Computer III* Further Remand Proceedings, Bell Operating Company Provision of Enhanced Services, *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040, 6091 (1998).

II and III, MVPDs under Title VI, public utilities under their industry models, and so on.[86] How, if at all, can these different regimes be reconciled? In this regard, we ask parties to consider the Internet industry as a model of what a maturing market for advanced telecommunications capability and advanced services might be. The Internet industry can be said to consist of four parts: (a) networks consisting of high-speed digital communications facilities or bandwidth, both backbone and last mile, (b) software and content to comprise a vast array of services, (c) packaging of services into combinations that will be attractive to different groups of retail customers, and (d) "information appliances" on customers' premises, including the features and functions from among telephones and other telecommunications terminals, computers, radio and television sets, and set-top boxes.

81. We ask, if the business of advanced telecommunications capability and advanced services evolves into a similar structure, what, if any, degree of economic regulation might be needed for it to serve the public interest?[87] If there is true choice in the supply of last miles to residential consumers, would any economic regulation be needed? Such a market might be as competitive as many markets that in this country are "regulated" only by the antitrust laws.[88] A limited governmental role might be needed, for example, to foster network reliability, access, interconnection and standard-setting where that would promote efficiency and where private bodies would not be as efficient. We seek comment on these issues.

82. What, if any, other regulation would be needed? Is it unrealistic to expect companies, many of whom have possessed and exercised market power for decades, to behave like the non-network parts of the Internet industry (b-d in paragraph 80 above)? Will interconnection occur, naturally or by operation of the antitrust laws, among advanced networks deployed by LECs, MVPDs, and ISPs? Would there be a need for regulatory involvement to ensure the kind of reliability and security that people have come to expect from POTS? Would there be network externalities, and if so, would they justify governmental stimulation of demand? To the extent there was a monopoly or oligopoly at the network level, would the best use of regulatory powers be to remove barriers to entry and to

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[86] Dividing each competitor's offerings into common carrier, broadcast, *etc.*, elements and regulating each part under a different system is an equally questionable alternative.

[87] By "economic regulation," we mean regulation of entry and exit, service offerings, prices, and profits. We presume that "consumer protection" regulation will be necessary.

[88] For example, 6 companies manufacture over 90% of the automobiles sold in the United States. No one suggests, however, that there be a Federal Car Commission that regulates entry, retail prices, *etc.*, in that business. Gregory L. White, *U.S. Vehicle Sales Rose 12% in May, GM's 13%*, WALL ST. J., A-3 (June 4, 1998), available at 1998 WL 3496693.

ensure fair access by participants in downstream segments (b-d in paragraph 80 above)?[89] Would there be bundling of monopoly or oligopoly services with either new services (information services) or customer premises equipment? Are there reasons to depart from our longstanding prohibition of bundling transmission services on the one hand with, on the other, customer premises equipment and/or enhanced services?[90] Would disputes among industry members be adequately resolved as they are in most industries, without involvement by regulators, as in the case of peering among Internet backbone providers until recently? Would any or all of the regulation described above be consistent with section 706 and the overall framework of the Act?

83. Cooperation with State Authorities. Section 706(a) calls on "[t]he Commission *and each State commission*" to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[91] We welcome comment on the role that this Commission's cooperation with state governments can play in removing barriers to investment in infrastructure and promoting competition under section 706. For example, NARUC has stated that "the
advanced services at issue consist of both inter- and intrastate services and the statute clearly contemplates coordinated FCC and State actions."[92] The International Telecomputing Consortium suggests that states expand "local" dialing areas to make the Internet more accessible to rural residents, allowing rural entities to aggregate their demand, and using state and local governments as "anchor customers" of the Internet.[93] We request comment on how this Commission can best interact with the states to achieve the goals of section 706. In particular, how can the Commission satisfy its obligation to promote the deployment of advanced services without intruding upon the state's obligation to do the same? We also ask if there are any parts of the task set by section 706 that are, as a matter of law, exclusively within the jurisdiction of either this Commission or the state commissions.

84. Information Gathering. The decisions that section 706 may call on the

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[89] Segment (a) of the business is the only one that resembles traditional common carrier activities. In general, common carrier obligations were adopted for persons performing functions that were essential to society, especially when such persons had little or no competition. *See generally* Munn v. Illinois, 94 U.S. 113 (1876).

[90] *See, e.g.*, 47 C.F.R. § 64.702.

[91] 47 U.S.C. § 157 note (italics added).

[92] Comments of the National Association of Regulatory Utility Commissioners at 4 (April 6, 1998). See also Comments of Pennsylvania Public Utility Commission on Bell Atlantic's Section 706 Petition at 21 (May 6, 1998).

[93] *Affordable Access, Rural Online: Overcoming Barriers to Rural Access: Some Preliminary Policy Recommendations*, International Telecomputing Consortium, http://www.itc.org/aaron/preliminaryrecommendations.html, visited June 22, 1998.

Commission to make will require information, perhaps in detail. One general subject of that information might be the deployment of backbone and last-mile plant containing advanced telecommunications capability, including specifics about different locations, numbers and/or percentages of potential customers passed, and the ability of plant to support xDSL and other broadband operations at different rates of speed. Plant might also be divided into such categories as sunk and fungible, fixed and movable, loop and interoffice. We welcome comment on whether this or other detailed information would be useful in measuring the achievement of the goals of section 706, and on how the Commission could obtain such information. To what extent are our current reports, such as ARMIS 43-07 about the infrastructure development of price cap incumbent LECs, useful for this purpose? We repeat the invitation we extended in paragraph 18 to all parties to furnish us with information -- technical, financial, and marketing -- about their and others' plans to deploy advanced telecommunications capability.

III. CONCLUSION

85. Upon commencing this inquiry into advanced telecommunications capability, we have several initial impressions. First, encouraging the deployment of advanced telecommunications capability for all Americans on a reasonable and timely basis must be a top priority for this Commission and for the quality of this country's life in the coming century. Second, there is a large number of potential suppliers and, from all that appears, a large demand. These circumstances would normally make us predict a well performing marketplace. This Commission is determined that this will occur -- that technology will be allowed to flourish, that bottlenecks will be made accessible (or, better, multiplied out of existence), and that regulation will speed, not slow, progress. We are also committed to implementing Congress's vision that the promise of advanced telecommunications capability extend to all Americans -- including those in schools, rural areas, inner cities, and on reservations. We intend to accomplish these aims consistently with the deregulatory, market emphasis of the Act. We call for the aid of all in this great national effort.

IV. PROCEDURAL MATTERS

86. Pursuant to Sections 1.415, 1.419, and 1.430 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, 1.430, interested parties may file comments on or before **September 8, 1998**, and reply comments on or before **October 8, 1998**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

87. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

88. Parties who ch. ose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 1919 M St. N.W., Room 222, Washington, D.C. 20554.

89. We note that there are many other proceedings now underway at the Commission that include issues that could affect a company's, or class of companies', incentive and ability to deploy advanced telecommunications capability.[94] If commenters wish to refer to their filings in another proceeding, they must provide in their comments to this proceeding a complete recitation of the pertinent information and also attach a copy of the document to which they refer.

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[94] *See, e.g.*, authorities cited *supra* nn.41, 45, Amendment to Parts 2, 15, & 97 of the Commission's Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications, *Memorandum Opinion & Order & Fourth Notice of Proposed Rule Making*, 12 FCC Rcd 12212 (1997); 1998 Biennial Regulatory Review - Testing New Technology, *Notice of Inquiry*, CC Docket No. 98-94, released June 11, 1998; Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band & to Allocate the 24 GHz Band for Fixed Service, Memorandum Opinion & Order, FCC 98-155 (released July 17, 1998) (spectrum allocation at 24 Ghz that removed sharing constraints on terrestrial and satellite systems); Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11, *Memorandum Opinion & Order & Notice of Proposed Rulemaking*, FCC 98-188, adopted August 6, 1998.

90. Subject to the provisions of 47 C.F.R. § 1.1203 concerning "Sunshine Period" prohibitions, this proceeding is exempt from *ex parte* restraints and disclosure requirements, pursuant to 47 C.F.R. § 1.1204(b)(1). Because many of the matters on which we request comment in this NOI may call on parties to disclose proprietary information such as market research and business plans, we suggest that parties consult 47 C.F.R. § 0.459 about the submission of confidential information.

91. For additional information regarding this proceeding, contact John W. Berresford, Senior Antitrust Attorney, Industry Analysis Division, Common Carrier Bureau, at 202-418-1886 or jberresf@fcc.gov.

V. ORDERING CLAUSE

92. Accordingly, IT IS ORDERED that, pursuant to section 706 of the Telecommunications Act of 1996, this Notice of Inquiry IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147

In Section 706(a) of the Telecommunications Act, Congress directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." This provision of the law is an explicit direction to anticipate and prepare for the future. Fulfilling the hopes and needs of citizens in the 21st Century will require widespread availability of much greater bandwidth than has traditionally been available through "plain old telephone service."

Today we begin the task of ascertaining the progress of, and prospects for, deployment of broadband capabilities throughout this country. We must ensure that high-bandwidth services roll out as quickly as the technology and the economics allow. Progress must not be impeded by inadequate competition or excessive regulation.

I hope to learn in this proceeding what we can do not only to promote the deployment of advanced telecommunications capability but also to facilitate consumer choice among broadband service suppliers. Although we have several pending petitions filed by incumbent telephone companies or their would-be competitors, we need to take a broader view. In the deployment of advanced telecommunications capability, multiple industry sectors can play a role.

Our notice of inquiry properly recognizes the multiplicity of potential bandwidth suppliers -- ILECs, CLECs, cable, wireless, and satellite companies, digital broadcasters, etc. The notice asks questions that will permit us to understand better how each industry sector can participate effectively in the bandwidth race, what advantages and disadvantages the various participants bring to the contest, and which barrier-reducing and competition-promoting steps the Commission can and should take. It also explores what special measures may be needed to meet the special needs of rural areas or to serve elementary and secondary schools and classrooms. I will welcome the development of a full record on these issues.

In our companion order and notice of proposed rulemaking, we demonstrate that we are prepared to do more than just ask questions. On certain issues, we have already developed a considerable record, as a result of various pending petitions, and this enables us to render certain threshold decisions and to tender several concrete proposals.

As I see it, the key issue we address today is whether advanced telecommunications capability is subject to the competitive framework so carefully established by Congress in

Sections 251 and 271 of the Communications Act. The answer is yes. I don't believe that Congress wrote detailed amendments to the Communications Act only to address voice, but not data, services. To the contrary, I believe a forward-looking and increasingly Internet-savvy Congress crafted a framework to promote competition and deregulation throughout all telecommunications markets as we enter a new chronological and technological millennium.

The Telecommunications Act is rooted in a strong belief in the power of competition, and in a recognition that the networks constructed over the past century by the incumbent LECs need to be "opened up" to enable competitive entry. What I like most about this order and notice of proposed rulemaking is that it both (1) requires incumbent LECs to open their networks in ways that allow multiple providers to offer high-bandwidth services and (2) provides a path for ILEC affiliates who are willing to compete on their merits, rather than on the basis of affiliation, to avoid regulation to the same degree as do their competitors. The goal is to expedite full and fair competition between a multiplicity of bandwidth providers, including ILEC affiliates, and thereby speed the availability of high-quality, reasonably priced, advanced telecommunications capability throughout the nation.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: *Memorandum Opinion and Order and Notice of Proposed Rulemaking, Petition of Bell Atlantic Corporation for Relief From Barriers to Deployment of Advanced Telecommunications Services et al. (CC Docket Nos. 98-11 et al.).*

Re: *Notice of Inquiry, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 (CC Docket No. 98-146).*

In this combined statement, I write separately to explain the bases upon which I support this *Order/NPRM* and *Notice of Inquiry*.

I am very pleased to support the *Order/NPRM*. First, I think the item evidences our desire to devise ways that *all* interested firms can participate in the deployment of advanced services -- even incumbents that possess market power in certain communications markets. Make no mistake: as a strong proponent of vigorous antitrust enforcement, I believe that government must continue and intensify its efforts to contain and ameliorate the negative effects of such market power where warranted. We should, in particular, be sensitive to the power such companies have over truly essential facilities. We should not fail, however, to recognize that these companies also may be well-positioned to provide services of enormous value to consumers. Simply put, we cannot relegate BOCs or other big companies to the sidelines in the data services "race" unless we are prepared to deny the economy and consumers of the benefits of these companies' expertise and capital.

Second, and relatedly, I applaud the *Order/NPRM* for what it signals. In particular, it signals that the Commission is willing to allow incumbent LECs to provide some services through a separate affiliate on a relatively unencumbered basis, subject primarily to our enforcement mechanisms. I am committed, personally and firmly, to ensuring that this alternative, "deregulatory pathway" is available to the extent permitted under the law.

As I have noted on many occasions, communications policy historically has emphasized prospective, prophylactic regulation. Yet such regulation tends to stifle innovation and impede the beneficial operation of market forces. We should look to performance measurement and vigorous enforcement, more often than prospective regulation, as a means to protect the public against certain identifiable harms. This approach will avoid hindering companies from improving their existing offerings and entering new markets that lie outside their traditional regulatory boundaries, and will usher in a more effective and efficient regulatory process.

The separate affiliate approach, if carefully implemented, offers the prospect of allowing us to police potential anticompetitive conduct more easily. As such, I believe this

approach takes the Commission another step away from the traditional regulatory model toward one that is more consistent with a rapidly evolving competitive marketplace. I applaud the Common Carrier Bureau and my colleagues for taking this important, deregulatory step with respect to encouraging the development of competition in advanced services.

Third, I believe the separate affiliate pathway will serve as a good example of how the Commission can promote congruence between our policy goals and private firms' self-interest. There is an unfortunate tendency in communications policy to rely on polices that depend for their implementation upon a company or an industry acting against its self-interest. This reliance is entirely misplaced. Firms are economic actors, not moral beings. Indeed, the market depends for its effectiveness on firms pursuing their economic self-interest. We must accept these premises and craft policies consistent with them. I am committed to pursuing the idea of a separate affiliate pathway because I believe it constitutes an important move in this direction. As the *Order/NPRM* notes, the requirement that an incumbent treat its advanced services affiliate only as well as it treats its competitors should give the incumbent a greater incentive to improve its processes and provide unbundled elements and collocation space as quickly and cheaply as possible to all competitors.

I should add that I am very cognizant of some of the fears expressed regarding the separate affiliate approach, particularly fears about the continued soundness of universal service support and new entrants' fears that allowing incumbents to use separate affiliates will somehow allow incumbent LECs to leverage their dominance in the local telephone market to control the market for advanced services. These fears are not unfounded. With respect to universal service, however, I would point out that it is my understanding that an incumbent's advanced services affiliate would have the same obligation to contribute to universal service as any other telecommunications carrier. With respect to new entrants' fears, I would urge us to consider the alternative to establishing a separate affiliate pathway. The dynamism and demand in the advanced services market is such that incumbents that do not provide these services through separate affiliates will surely do so on a highly integrated basis. If that happens, our ability to enforce interconnection, unbundling and other requirements with respect to advanced services will be as difficult and, I fear, as uphill a battle, as our enforcement of these requirements for traditional circuit-switched services. Thus, I submit that even if the separate affiliate approach may involve risks -- which I am committed to addressing -- the alternative may not put us in any better position to promote competition in advanced services.

I also support the adoption of this *Notice of Inquiry*. Encouraging deployment of advanced telecommunications services promises both to challenge our conventional understanding of technology within the existing statutory and regulatory framework and to usher in exciting new communications capabilities for average Americans. The trick is getting from here to there; that is, we must overcome the various technological, legal and economic impediments to deployment in order to let consumers and organizations appreciate fully the possibilities advanced communications services offer. Indeed, section 706 requires

not only that these services be deployed, but that the Commission and each state Commission encourage such deployment on a reasonable and timely basis to all Americans. Moreover, we must do so consistent with the deregulatory, market emphasis of the Act.

I invite parties commenting on the *Notice* to help us conduct a thorough review of where we have been, where we are, and where we need to be in order to encourage the deployment of advanced services. I hope that, in using this information, we will be sensitive to the fact that requiring certain firms to provide access to their facilities or services to other firms or even to end users may have some negative consequences. In particular, I think we should search for ways to promote innovation and competition in the provision of "last mile" transmission to homes and businesses. While mandating access is a useful tool and can bring about short-term gains in retail competition, it also may undermine incentives for developing new ways to circumvent the power of incumbents over distribution.

Both the *Order/NPRM* and the *Notice of Inquiry* offer evidence that the Commission understands that neither competition nor innovation is the product of the well-meaning regulatory policies we adopt, even if our policies create the appearance of competition in the short-term; rather, competition and innovation are the result of self-interested actors struggling in the marketplace to provide consumers with new and better products and services. I firmly believe that our policies should continue to take account of this fact. I believe we also must focus more on the longer-term future in carrying out Congress' instruction that we encourage the deployment of advanced communications. I wish to underscore my personal commitment to following this instruction at the same time we seek to promote the deregulatory and pro-competitive goals of the Act.

I praise the Bureau's efforts, as well as those of my colleagues, on this critical and challenging subject. And I look forward to working with everyone at the Commission, in the States and in Congress to help make our effort to encourage the deployment of advanced communications a success.